1994

US Xpress INC., C.V. Sohn INC., Southwest Motor Freight INC., Umthum Trucking Comapny INC., and Wisconsin Express Lines INC., v. Operations Division of the Utah State Tax Commission : Brief of Petitioner

Utah Court of Appeals

UTAH COURT OF APPEALS

US XPRESS, INC.; C.V. SOHN, INC.; SOUTHWEST MOTOR FREIGHT, INC.; UMTHUN TRUCKING COMPANY, INC.; and WISCONSIN EXPRESS LINES, INC.,	)	
Petitioners,	)	Case No. 940153-CA
v.	)	
OPERATIONS DIVISION OF THE UTAH STATE TAX COMMISSION,	)	
Respondent.	)	

PRIORITY 14

BRIEF OF PETITIONERS

PETITION FOR WRIT OF REVIEW OF

A FINAL DECISION AND ORDER OF THE

UTAH STATE TAX COMMISSION

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STATEMENT OF JURISDICTION

This Petition for Review arises from a final Decision and Order of the Utah State Tax Commission, dated November 23, 1993. The Court has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(e)(ii) (1993).

STATEMENT OF THE ISSUES

The Utah State Tax Commission has levied and/or collected a tax on special fuel consumed by each Petitioner during "non-propulsion" operation, as that term is defined elsewhere herein. Accordingly, the issue presented is whether the Petitioners are liable for a tax on special fuel consumed during non-propulsion operation of Petitioners' motor vehicles.

The specific issue of law to be addressed in this Petition is whether the Respondent has erroneously interpreted the statute regarding the taxation of special fuel to preclude the granting of an exemption for special fuel consumed in "non-propulsion".

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Each of the Petitioners in this case is an interstate trucking company which operates its motor vehicles within the State of Utah and upon the highways of the State. Those vehicles consume diesel fuel which, by definition found in Utah Code Ann. §59-13-102 (1993), as amended, is "special fuel".

In the operation of their motor vehicles, the Petitioners

normally and customarily consume special fuel while the vehicles in question are parked with the motors running. For purposes of this Petition, such consumption of fuel is referred to as "non-propulsion" consumption of special fuel.

Each of the Petitioners are required, by the Respondent, to file a quarterly report showing the amount of special fuel consumed, without differentiating between that fuel which is consumed while said vehicles are being propelled over the highways of the State and that fuel which is being consumed while said vehicles are in a non-propulsion mode. The Respondent then requires each of the Petitioners to pay a tax on the fuel thus consumed.

The Petitioners have sought from the Respondent an exemption from the special fuel tax for that fuel consumed while the vehicles are in a non-propulsion mode. The Petitioners, in order to measure the amount of non-propulsion fuel consumed, utilize a monitoring system which performs the function of calculating and recording the amount of non-propulsion fuel consumed. However, the Respondent refuses to allow such exemption and insists that the special fuel tax be paid on all fuel consumed in the vehicles, whether in the propulsion or non-propulsion mode.

B. COURSE OF PROCEEDINGS AND DISPOSITION BY RESPONDENT.

Before the Tax Commission, these Petitioners were consolidated by agreement. It was stipulated by these Petitioners and the

Respondent that the issues presented were identical to each Petitioner.

These matters were commenced by the filing, by each Petitioner, of a Petition for Redetermination. (R. W-36.) In these Petitions for Redetermination, the Petitioners sought refunds of various amounts of special fuel tax which they claimed were over-paid to the Respondent. Each Petitioner had filed the required quarterly reports with the Respondent. Each Petitioner then recalculated those quarterly reports, deducting the amount of special fuel tax paid on the non-propulsion fuel consumed. The requests for refunds were denied by the Respondent, resulting in the Petitions for Redetermination.

The issue of whether the Petitioners are liable for a tax on special fuel consumed in the non-propulsion mode was raised with the Respondent by the filing of a Motion for Partial Summary Judgment. Both Petitioners and the Respondent filed memoranda of law in support of their respective positions. The matter was argued pursuant to a Formal Hearing, which was held before the Honorable Paul F. Iwasaki, Administrative Law Judge, and pursuant to Utah Code Ann. §§ 63-46b-6 through 63-46b-11 (1987, as amended), on August 17, 1993.

On October 15, 1993, the Respondent issued its Order (R. 23), finding as follows:

> Fuel consumed in the non-propulsion operation of a motor vehicle on the public highways of the state is subject to special fuel tax.

On November 23, 1993, the Respondent issued its final Decision and Order encompassing the decision of October 15, 1993, and dismissing the Petitions for Redetermination and Refund of Tax. (R.6.)

STATEMENT OF RELEVANT FACTS

Each of the Petitioners is an interstate trucking company operating trucks both within and without the State of Utah. These trucks consume diesel fuel which is, by definition, referred to as special fuel in the applicable statutes. (R. 39.)

The normal and customary operation of these kinds of diesel trucks includes not only time when the engine is running and the vehicle is being propelled down the road and upon the highways of this State, but also a substantial period of time when the engine is running, diesel fuel is being consumed, but the vehicle is not being propelled down the road or upon the highways of this State. It was undisputed in the hearing below that the normal and customary operation of these kinds of diesel trucks mandate that they often are stopped and parked, either in off-road truck stops, rest stops or at restaurants, with the engine running. (Tr. 4.)

In a normal passenger vehicle, the driver pulls into a rest stop or to a restaurant or motel, shuts off the engine and vacates the vehicle. However, with diesel trucks of this kind, the driver will often vacate the vehicle but leave the engine running. Often the engine is required to be running because of atmospheric conditions which require that it continue to run to perform at maximum efficiency. (Tr. 5.) In many cases the engine must run so that the climate control system in the vehicle itself or in the

trailer being pulled are maintained. As often as not, the engine is running while the vehicle is parked simply to maintain the climate control systems within the sleeping compartments, which are commonly found on this type of diesel truck.

The important point is that a substantial amount of special fuel is consumed by the vehicles of these Petitioners during times when the vehicles are not being propelled on the highways of the State of Utah. For purposes of this Brief, as well as in the hearing below, this consumption of fuel is referred to as non-propulsion consumption of fuel.

In order to calculate the amount of special fuel consumed during the non-propulsion operation of these vehicles, each of the Petitioners has installed a monitoring system which is designed to calculate the amount of non-propulsion fuel used. A complete description of the system is included in the record as an attachment to the Memorandum of Points and Authorities in Support of Petitioners' Motion for Partial Summary Judgment. (R. 51-56.) A complete description will not be included in this Brief for the reason that it was agreed at the hearing below that the viability or acceptability of the system was not at issue. Rather, the sole issue determined by the hearing below was whether the non-propulsion fuel consumed was taxable. (Tr. 24-25.)

For purposes of this Brief, it is sufficient to note that the system calculates the amount of fuel consumed when two situations are present on the affected vehicles: first, the electric fuel pump on the vehicle must be operating and, second, the airbrakes on

the vehicle must be set. When these two conditions exist, a meter on the vehicles automatically operates to calculate the amount of time that the vehicle was in this mode. By simply multiplying the amount of time from the meter times the per gallon consumption of the vehicle in this mode, a reasonably accurate calculation of the amount of non-propulsion fuel can be obtained.

Care was taken at the hearing below to differentiate between fuel consumed in the non-propulsion mode and fuel consumed in an "idle" mode. The term "idle" is a term which has specific meaning in the trucking industry. A truck is at "idle" any time the rpms of the engine are below 1,000. However, a truck might well be on the highway and being propelled down the road when the rpms are less than 1,000. In order to prevent the inclusion of fuel consumed at "idle" with fuel consumed at non-propulsion, the system requires that the airbrakes of the vehicle be set. This insures that the vehicles is truly in a non-propulsion mode. (Tr. 5-6.)

The Operations Division of the Utah State Tax Commission requires that each Petitioner file a quarterly report which is designed to calculate the amount of gallons of special fuel consumed by the vehicles within the State of Utah. (R. 40.) However, that report does not take into account special fuel consumed in the non-propulsion mode. Each of the Petitioners filed the necessary quarterly reports and then sought a refund of that amount of the tax levied on the non-propulsion consumption of fuel. Those requests for refunds were refused, prompting the present Petition for Review.

SUMMARY OF ARGUMENT

The Petitioners are not liable for special fuel tax on fuel consumed in the non-propulsion mode for these primary reasons:

First, the refusal of the Respondent to grant an exemption for non-propulsion consumption of special fuel violates the clear legislative intent and purpose of the special fuel tax. It is clear from the language used by the legislature in the statute, as well as the purpose underlying the statute, that non-propulsion fuel was not intended to be the subject of the special fuel tax. The tax, itself, was enacted by the legislature to provide for a specific problem, i.e., the extraordinary damage visited upon the roads of this State by heavy over-the-road trucks. The legislative language speaks of fuel which is used to propel vehicles upon the highways of the State. Since the consumption of non-propulsion fuel does not propel vehicles over the roads and does not cause the extraordinary damage to the roadways, the special fuel tax does not apply. The fact that the Tax Commission, itself, has granted exemptions from the special fuel tax for the "off road" and other non-propulsion consumption of the special fuel illustrates this very point.

Second, the application and construction of the statute by the State Tax Commission which results in a taxing of the non-propulsion fuel is discriminatory, and therefore violates the equal protection guarantees of the Utah Constitution. The Respondent has promulgated various rules to assist in the levy and collection of

the special fuel tax. In those rules the Respondent has granted an exemption for such uses as off-highway miles or vehicles with power take off units, where the power take off unit is driven by the main engine. Despite the granting of exemptions for such uses, the Tax Commission refuses to grant an exemption for non-propulsion consumption, which is essentially identical to the other exemptions. Accordingly, there is no rational basis for the denial of the exemption for non-propulsion use and the application of the statute by the Respondent is arbitrary and discriminatory.

Finally, the taxing of non-propulsion fuel is in conflict with the International Fuel Tax Agreement (IFTA) to which Utah is currently a party. The statutes of the State of Utah provide that where the State enters into such cooperative agreements, and where the terms of those agreements are in conflict with any rules promulgated by the Commission, the provisions of the agreement will prevail. It is the position of these Petitioners that IFTA calls for the taxing of fuels used in the propulsion of motor vehicles, not in the non-propulsion of motor vehicles.

ARGUMENT

POINT I
THE INTENT AND SPECIFIC LANGUAGE OF THE STATUTE SUPPORTS THE NON-TAXATION OF NON-PROPULSION SPECIAL FUEL.

The authority of the Respondent to levy and collect tax on special fuel is derived and circumscribed by statute. Accordingly, the authority to collect a tax on special fuel consumed during non-propulsion operation must be found in the statute or it does not exist.

The authority for assessment of a tax on special fuel is found in the Utah Motor and Special Fuel Tax Act, §59-13-101 et seq., Utah Code Annotated (1953), as amended (the "Act"). In determining the authority granted by the Act certain rules of construction and interpretation are applicable.

First, every statute must be interpreted in light of the legislative intent which the statute was designed to achieve. As stated by the Utah Supreme Court in Board of Education of Granite School District v. Salt Lake County, 659 P.2d 1030, 1033 (Utah 1983):

> The fundamental consideration in interpreting statutes is legislative intent; and that is determined in light of the purpose the statute was designed to achieve.

A corollary to this rule is that the statute should not be construed piecemeal, but in light of the entire statutory scheme. Thus in Amax Magnesium Corporation v. Utah State Tax Commission, 796 P.2d 1256 (Utah 1990), the Supreme Court stated:

> The principle rule of statutory construction is that the terms of a statute should not be interpreted in a piecemeal fashion, but as a whole. Id. at 1258.

The second principle is that all words and phrases used in the statute are to be construed in accordance with their meanings and definitions. Thus, in Cannon v. McDonald, 615 P.2d 1268 (Utah 1980), the Utah Supreme Court declared:

> In interpreting the statutory language care must be taken to construe the words used in light of the total context of the legislation and when the construction of a section involves technical words and phrases which are defined by statute, the provision must be construed according to such peculiar and appropriate meaning or definition. Id. at 1270.

In harmony with this declaration is the statement of the Utah Supreme Court in Amax, supra,:

> A second rule of statutory construction mandates that a statute be read according to its literal wording, unless it would be unreasonably confusing or inoperable. It is presumed that a statute is valid and that the words and phrases used were chosen carefully and advisedly. Id. 1258.

It is no mystery that the Act here in question was enacted for the purpose of raising special revenues, which were to be used for a single purpose. The Utah legislature intended to tax those who used the highways for their use of the highways. More specifically, the special fuel tax was designed to impose a greater burden on those who, by reason of the weight and size of their vehicles, cause greater damage to those highways.

By the same token, it is apparent from the strict language of the Act that the legislature did not intend to tax non-highway users for highway use. Thus, in Utah Code Ann. §59-13-301(2) (1990), the legislature declared:

> No tax is imposed upon special fuel which:
>
> > (a) is sold or used for any purpose other than to operate or propel a motor vehicle upon the public highways of the state . . ..

Similar exceptions are granted for other off-highway uses such as aviation uses. See, §59-13-102(3)(b) (1993).

Careful scrutiny of part 3 of the Act, involving special fuel, indicates that the tax was to be levied only on special fuels which are used for propulsion operation of vehicles. For example, in the definitional section, §59-13-102(3)(d), a special fuel is defined as a fuel which "is usable as fuel to operate or propel a motor

vehicle upon the public highways of the state . . .". (Emphasis added.) Similarly, as has been discussed above, under §59-13-301, the Respondent is prevented by the legislature from collecting a tax on special fuel which is not used for propulsion operation of a vehicle on the public highways of the state.

The intent of the legislature must be discerned from the language which it uses. The intent of the legislature was to exact a tax upon the use of fuel used while driving upon the highways, an activity which causes damage to and wears out those highways. At the same time, the legislature did not intend to tax that fuel which is not used to drive upon the highways and to wear out the same. The method used by the Respondent to calculate this tax does not take into account the fact that many hours and much fuel is consumed by vehicles which are standing, parked, with the engine running. This fuel is not being used to wear out or damage the highways systems of the state; therefore, this fuel was not intended to be taxed by the legislature.

The fact that the legislation uses the term "operate", along with the term "propel", does not change the outcome. The Utah Supreme Court has repeatedly made statements such as that found in Parson Asphalt Products, Inc., v. Utah State Tax Commission, 617 P.2d 397 (Utah 1980):

> . . . there is also to be considered the over-arching principle, applicable to all statutes, that they should be construed and applied in accordance with the intent of the Legislature and the purpose sought to be accomplished.

Id. at 398. (Emphasis added.)

The statutes here in question never use the words "operate" or "propel", except in conjunction with the phrase "upon the public highways of the state". Therefore, the legislature clearly intended that the words operate and propel would be synonymous. The intent of the legislature was to tax for the use of the highways. The entire statutory scheme dictates that there not be a tax where the use of the highways is not involved. In the case at hand, the non-propulsion consumption of special fuel does not involve the use of the highways and should not, therefore, be taxed.

POINT II
THE APPLICATION OF THE STATUTE BY THE RESPONDENT IS UNCONSTITUTIONAL

Article I, §24 of the Utah Constitution guarantees the uniform operation of laws within the state. The Utah Supreme Court has stated that this provision is essentially similar to the equal protection provisions of the Federal Constitution. See, Blue Cross & Blue Shield v. State of Utah, 779 P.2d 634 (Utah 1989). Indeed, as stated in the Blue Cross ruling:

> Our examination into the reasonableness of economic legislation under article I, section 24 of the Utah Constitution is at least as vigorous as that required by the federal equal protection clause, and probably more so. Id. at 637.

The guarantees of the Utah Constitution are that laws will not be applied unequally and that essentially similar classifications of tax payers will be treated similarly. As the Supreme Court stated in Blue Cross:

> The concept underlying this provision is "the settled concern of the law that the legislature be restrained

> from the fundamentally unfair practice" of classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by that law, to the detriment of some of those classified. Id. at 637.

Put another way, a law, or the application of a law, is unconstitutional if it makes an unreasonable or insupportable differentiation between persons of the same class or situation. In Continental Bank and Trust Company v. Farmington City, 599 P.2d 1242 (Utah 1979) the Supreme Court stated the proposition simply:

> Where some persons or transactions excluded from the operation of the law are, as to its subject matter, in no differentiable class from those included in its operation, the law is discriminatory in the sense of being arbitrary and unconstitutional. Id. at 1245.

See, also, State v. Mason, 94 Utah 501, 78 P.2d 920 (1938).

In the case at hand, the Respondent has admitted that the special fuel tax does not apply to the consumption of fuel which is not used in connection with the use (and therefore damage of) the public highways. The Respondent has enacted specific rules governing the administration and imposition of the special fuel tax. Rule 865-4 deals with the special fuel tax. A copy of the Rule is attached as Appendix A. Subsection D of the Rule provides that "no excise tax is imposed upon special fuel which is sold or used for any purpose other than to operate or propel a motor vehicle upon the public highways of the state". The Rule then specifically exempts three types of special fuel use:

1. Use other than in motor vehicles;
2. Use in vehicles off-highway; and

3. Use in motor vehicles with power take off units, where the power take off unit is driven by the main engine of the vehicle.

In the third type of use, the Rule then gives specific percentages of exemption for non-highway use for such things as concrete mixer trucks (20%), garbage trucks (5%) and vehicles with powered pumps, conveyors or other unloading devices.

The Respondent has given an exemption to certain classifications of users based upon their type of use. The Respondent has admitted that there are substantial uses of special fuel from a fuel tank of a diesel truck which are not for the prupose of propelling the vehicle over the highways of the state. Interestingly, the Respondent has not, in granting these exemptions, required specific accountings as to the actual fuel use but has granted, instead, a blanket percentage exemption.

The non-propulsion use of the Petitioners is absolutely no different from the non-propulsion use of these other special users. When a cement mixer truck is standing and is discharging cement, it is consuming special fuel but not propelling the vehicle. When one of the diesel trucks of Petitioners is standing at a restaurant or truck stop with the engine running to maintain various systems on the truck, it is consuming special fuel and not using the highways of the state. Yet, the Respondent has granted an exemption for the cement truck but not granted an exemption for the trucks of Petitioners. This classification becomes even more perplexing since these Petitioners are not asking for a blanket exemption or

a bare percentage, but are asking only for that deduction from the special fuel tax which they can verify through the monitoring system.

In Amax Magnesium, supra, the Supreme Court determined that there was no reasonable relationship between the classification of the Tax Commission and the purpose of the statute. Accordingly, the statute in Amax was found to be violative of Article I, Section 24, of the Utah Constitution. 756 P.2d at 1261.

The same result must be applied to the case at bar. There is absolutely no justification for allowing an exemption from the special fuel tax for one user, while at the same time, denying that exemption to another user in an identical situation.

The ruling of the Administrative Law Judge is founded upon the argument that the word "or" to separate the words "operate" and "propel" evidences "a legislative intent to list two separate and distinct processes, either of which could render the special fuel subject to taxation". (R. 27.) If such were the case, however, there would be no rational basis for allowing exemptions for such things as cement mixers and garbage trucks. In both cases, the word operate would cover the non-propulsion consumption of fuel in those vehicles. Nevertheless, the Respondent grants an exemption to such non-propulsion uses.

The Utah Constitution provides that all laws will be uniformly applied and that all citizens will be uniformly treated. While this guarantee is not without its limitations, there should be no limitation to the facts at hand. There is no reason that these

Petitioners cannot be treated equally with other special users.

POINT III
THE INTERNATIONAL FUEL TAX AGREEMENT (IFTA) FURTHER SUPPORTS NON-TAXATION OF NON-PROPULSION SPECIAL FUEL

As indicated in the hearing below (Tr. 38, 39), the State of Utah is a party to the International Fuel Tax Agreement (IFTA) currently in effect. Utah Code Ann. §59-13-501(7) (1988) specifically provides:

> If the Commission enters into any agreement under the authority of this section, and the provisions established in the agreement are in conflict with any rules promulgated by the Commission, the agreement provisions prevail.

IFTA currently supports the notion that non-propulsion consumption of fuel is not, and should not be, the subject of any special tax. Section II of the current IFTA Articles of Agreement (February, 1993) defines "motor fuels" as "all fuels used for the generation of power for propulsion of qualified motor vehicles". In addition, Section III at Subsection A provides as follows:

> For purposes of this Agreement, **the taxable event is the consumption of motor fuels used in the propulsion of qualified motor vehicles**, except fuel consumed that is exempt from taxation by a jurisdiction. (Emphasis added.)

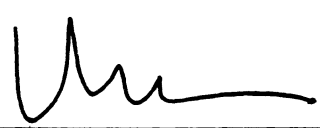
There seems to be little doubt that under IFTA, taxation of motor fuels is limited to that fuel which is consumed in the act of propulsion. The whole concept of IFTA is to tax for fuel consumed in the act of wearing out or damaging the highways. The whole nature of fuel taxes is directed at specifically that activity. IFTA excludes the consumption of fuel for "non-propulsion" activities.

Petitioners believe that the statutes of the State of Utah are in harmony with the provisions of IFTA. Both IFTA and the Utah statutes envision the consumption of fuel to propel a vehicle over the highways of this state. Both IFTA and the Utah statutes exclude, as has been discussed above, the taxation of fuel consumed in non-propulsion operation. However, the refusal of the Respondent to grant an exemption creates a direct conflict between the statutes of the State of Utah, the provisions of the Agreement and the rules promulgated by the Respondent. Accordingly, in accordance with §59-13-501(7), the provisions of IFTA must prevail.

CONCLUSION

By not allowing a deduction for non-propulsion fuel, the State Tax Commission is, in essence, taxing fuel which is not consumed by these Petitioners in this state. When the Petitioners are required to report both fuel consumed in propulsion and fuel consumed in non-propulsion, the effect is to tax fuel which is actually used on the highways of another state. The Respondent cannot justify, on any basis, granting differential treatment to these Petitioners, as opposed to other non-propulsion consumers of special fuel. The laws of the State of Utah are, therefore, not being uniformly applied. The decision of the Respondent must be reversed and the Petitions for Redetermination granted.

RESPECTFULLY SUBMITTED this 17th day of June, 1994.



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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief was served on the following individual by placing the same in the United States mail, postage pre-paid, this 17th day of June, 1994.

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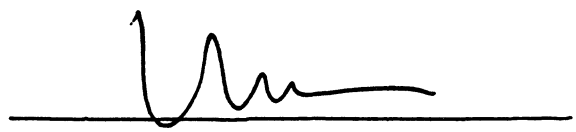

APPENDIX A

R865. Tax Commission, Auditing.
R865-4D. Special Fuel Tax.
R865-4D-1. Utah Special Fuel Tax Regulation Pursuant to Utah Code Ann. Section 59-13-102.

A. Motor vehicle means and includes every self-propelled vehicle operated or suitable for operation on the highways of the state which is designed for carrying passengers or cargo; but does not include vehicles operating on stationary rails or tracks, or implements of husbandry not operating on the highways.

B. User means any person using special fuel for the propulsion of a motor vehicle on the highways of the state, including:

1. interstate operators of trucks and buses,

2. intrastate operators of trucks and buses, and

3. contractors using special fuel in self-propelled vehicles for carrying of passengers or cargo.

R865-4D-2. Imposition of Special Fuel Tax and Exemptions Pursuant to Utah Code Ann. Section 59-13-301.

A. An excise tax is imposed on the sale or use of special fuel.

B. The tax shall be collected and paid to the state by the user-dealer in all cases where the fuel is sold and delivered directly into the service tank of a motor vehicle except in the following two cases:

1. The fuel is sold or delivered into vehicles of the U.S. Government or to the state of Utah or any of its political subdivisions. Refer to Utah Code Ann. Section 59-13-301(2)(b).

2. The fuel is sold or delivered into a motor vehicle for which the owner or operator possesses an unexpired Special Fuel Tax Exemption Certificate. Refer to Utah Code Ann. Section 59-13-301(2)(c) and Section 59-13-304.

3. The following pertains to the Special Fuel Tax Exemption Certificate:

a) Users of hydrogen, electricity or other exotic special fuels that are not conveniently measurable on a gallonage basis qualify for exemption from the special fuel tax and must purchase an exemption certificate pursuant to Utah Code Ann. Section 59-13-304.

b) Each operator of a motor vehicle powered by propane, alcohol or other special fuel measurable on a gallonage basis, except diesel fuel, may buy an exemption certificate as provided in Utah Code Ann. Section 59-13-304 or be subject to the special fuel permit, licensing, and reporting requirements of Utah Code Ann. Section 59-13-303, 59-13-305, and 59-13-502.

(1) For the purpose of taxing compressed natural gas used in motor vehicles, one gallon is equal to 100 cubic feet of compressed natural gas measured at standard pressure of 14.73 psi and temperature at 60 degrees Fahrenheit.

c) The fee for an exemption certificate is due when the vehicle using such fuel is placed in operation and annually thereafter on the date the vehicle is registered in Utah. For a vehicle not registered in Utah, the fee is due on the date the vehicle begins operation in Utah on a continuing basis. The fee paid for a vehicle placed in operation may be pro-rated on a monthly basis if the certificate obtained for the vehicle is valid for a period of less than 12 months. No refund of fees paid will be allowed if a vehicle is sold or otherwise disposed of prior to the expiration date of the certificate.

C. The tax shall be reported and paid by any user of special fuel who is required by Utah Code Ann. Section 59-13-303, 59-13-305, and 59-13-502 to obtain a fuel permit or license and file fuel tax reports.

1. The tax shall be based on the number of gallons used. Gallons used shall be computed by dividing the total miles traveled on the highways of Utah by the average number of miles per gallon attained by the user's vehicles.

2. The user shall receive credit for special fuel taxes paid to a user-dealer on fuel purchased which is delivered into the user's vehicles and for which special fuel tax liability is reported.

D. No excise tax is imposed upon special fuel which is sold or used for any purpose other than to operate or propel a motor vehicle upon the public highways of the state. Refer to Utah Code Ann. Section 59-13-301(2)(a). For special fuel user-dealers this means that the excise tax is not charged on bulk sales of special fuel and other sales of special fuel where delivery is made into

a container other than the service tank of a motor vehicle. For special fuel users this means that the special fuel tax exemption is allowed for the following three types of special fuel use:

1. Use other than in motor vehicles.

2. Use in vehicles off-highway. Fuel used off-highway is calculated by taking off-highway miles divided by the average number of miles per gallon. Any other method of calculating special fuel used off-highway must be supported by on-board-computer information or other information that shows the number of gallons used off-highway with accuracy equal or comparable to on-board computers.

3. Use in motor vehicles with power take-off units. Where a power take-off unit is driven by the main engine of the vehicle and used to operate auxiliary equipment a quantity , as enumerated below, of the total fuel delivered into the service tank of the vehicle shall be deemed to be for non-highway use and exempt from the special fuel tax. The type of units and non-highway allowances are as follows:

a) concrete mixer trucks - 20 percent,

b) garbage trucks with trash compactor - five percent,

c) vehicles with powered pumps, conveyors or other unloading devices may be individually negotiated but shall not exceed

(1) 3/4 gallon per 1000 gallons pumped; or

(2) 3/4 gallon per 6000 pounds of commodities unloaded such as coal, grain, potatoes, etc..

4. Allowances herein provided for will be recognised only if adequate records are maintained to support the amount claimed.

5. Special fuel used on-highway for purposes of idling a vehicle is not exempt from the special fuel tax since the fuel is used in the operation of a motor vehicle.

6. Special fuel which is exempt from the special fuel excise tax is subject to sales and use tax.

R865-4D-3. User-Dealer's License Pursuant to Utah Code Ann. Section 59-13-302.

A. Prior to any sale or use of special fuel in this state each user-dealer shall apply for and obtain a special fuel user-dealer's license for each bulk plant or service station from which such special fuel is to be sold or used. Application for a special user-dealer's license shall be made on a form provided by the Tax Commission. Under the law the Tax Commission may require a user-dealer to furnish a bond. Upon receipt and approval of the application, the commission will issue the license. A special fuel user-dealer's license is valid only for the user-dealer in whose name issued and for the specific bulk plant or service station named on the license. The license shall remain in force and effect unless the holder of the license ceases to act as a user-dealer, or the Tax Commission for reasonable cause terminates the license at an earlier date.

B. Upon sale or discontinuance of the sale or distribution of special fuel as defined in this rule from a bulk plant or service station for which a license has been issued, the user-dealer shall return for cancellation the license issued for the bulk plant or service station.

R865-4D-5. Special Fuel Tax Entrance Permits Pursuant to Utah Code Ann. Section 59-13-303.

A. Any owner or operator of a qualified motor vehicle entering or traveling within the state of Utah must:

1. carry in the cab of the vehicle a special fuel permit or license pursuant to Utah Code Ann. Sections 59-13-303, 59-13-305, and 59-13-502, or

2. purchase a Special Fuel Tax Entrance Permit.

B. Special Fuel Tax Entrance Permits shall:

1. state the name and address of the registered owner of the vehicle,

2. identify the vehicle for which it is issued,

3. be valid until the expiration of 96 hours from the time of issuance or until the vehicle exits the state, whichever occurs first, and

4. cost $20.

C. A person who buys a Special Fuel Tax Entrance Permit for a motor vehicle is required to pay special fuel tax to the user-dealer on purchases of special fuel which are delivered into the vehicle's fuel supply tank.

D. A licensed or permit user having occasion to buy the Special Fuel Tax

Entrance Permit is required to report and pay tax on miles traveled under such permit; no credit or refund is allowed on the tax report either for miles traveled under the permit or for dollars paid for the permit.

R865-4D-6. Invoices Pursuant to Utah Code Ann. Section 59-13-307.

A. Every user-dealer or retail dealer of special fuel who sells special fuel exempt from tax must at the time of each sale and delivery issue an invoice to the purchaser.

1. If requested, an invoice must also be issued to the purchaser of special fuel that pays the tax at the time of purchase. This invoice shall serve as evidence that the special fuel tax has been paid.

B. Invoices must be numbered consecutively, made in duplicate, and contain the following information:

1. name and address of seller,
2. place of sale,
3. date of sale,
4. name and address of purchaser,
5. fuel type,
6. number of gallons d,
7. unit number or other vehicle identification if delivered into a motor vehicle,
8. type of container delivered into if not a motor vehicle,
9. invoice number,
10. amount and type of state tax charged, if any.

C. The user-dealer must retain a copy of each tax exempt invoice and be able to account for each tax exempt delivery made.

D. The burden of proving that a sale of special fuel is exempt shall be upon the person who makes the sale. In any case, if during an audit or at other times upon request of any member or agent of the Tax Commission the user-dealer fails to produce an acceptable invoice or other acceptable evidence in support of the user-dealer's claim that a sale is exempt, the sale is considered taxable and the tax shall be payable by the user-dealer.

E. On an exempt sale of propane or other special fuels other than diesel fuel for which a valid special fuel tax exemption certificate is presented to the dealer as evidence of exemption, the invoice must identify the make, year, and license number of the vehicle.

F. Generally, a user-dealer or retail dealer of special fuel making sales of special fuel by means of an unattended, automated metering system activated by a card or key, or similar device, must charge special fuel tax on the sales made through the various meters on the system. The tax must be charged because without information to the contrary, it is assumed that the fuel sold through the various meters is delivered into the service tanks of motor vehicles.

1. As an exception to the general rule, the user-dealer may exempt a particular meter number assigned to a customer from the special fuel tax if the customer signs a statement to the effect that none of the fuel metered under that meter number will be delivered into a motor vehicle. The statement must be retained on file by the user-dealer to support the special fuel tax exempt nature of the sale.

2. The user-dealer must charge sales tax on special fuel tax exempt sales except in those cases where the user-dealer has received and retains on file a properly completed Sales and Use Tax Exemption Certificate exempting the transaction from sales tax.

R865-4D-18. Maintenance of Records Pursuant To Utah Code Ann. Sections 59-13-305(1) and 59-13-312.

A. Utah Code Ann. Section 59-13-312(1) requires every user to maintain special fuel records and documents for a period of three years. The records and documents maintained must substantiate fuel purchased and the amount of fuel used in the state which is claimed on the special fuel report required by Utah Code Ann. Section 59-13-305(1). Specifically, every user must maintain detailed mileage records and summaries for fleets traveling in Utah, detailed fuel purchase records, and bulk disbursement records. From this information, an accurate average miles per gallon (mpg) figure can be determined for use in computing fuel tax due. For any special fuel not considered in the mpg

computation, detailed records must be maintained showing that the fuel was used for a purpose other than to operate or propel a motor vehicle. Refer to R865-4D-2. Individual vehicle mileage records (IVMRs) must be maintained which separate Utah miles from non-Utah miles; Utah miles must be separated further into taxable Utah miles and non-taxable Utah miles. An adequate IVMR will show the following:

1. starting and ending dates of trip,
2. trip origin and destination,
3. route of travel, beginning and ending odometer or hubometer reading, or both,
4. total trip miles,
5. Utah miles,
6. fuel purchased or drawn from bulk storage for the vehicle; and
7. other appropriate information which identifies the record such as unit number, fleet number, record number, driver's name, and name of the user or operator of the vehicle.

B. If the user fails to maintain or provide adequate records from which the user's true liability can be determined, the Tax Commission shall, upon giving written notice, estimate the amount of liability due. Such estimate shall take into consideration any or all of the following:

1. any available records maintained and provided by the user,
2. historical filing information,
3. industry data,
4. a flat or standard average mpg figure.

a) The standard average mpg normally applied is four mpg for qualified motor vehicles; and six miles per gallon for non-qualified motor vehicles.

C. Utah Code Ann. Section 59-13-312(2) requires that the user be able to support credits claimed for tax-paid fuel with documents showing payment of the Utah special fuel tax. If documents and records showing payment of the Utah special fuel tax are not maintained or are not provided upon request, the credits will be disallowed.

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